IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1364

RHONE-POULENC, S.A., DENISE MANCY, LEON NINET & JEAN PREUD'HOMME, *Petitioners*

v.

C. MARSHALL DANN, COMMISSIONER OF PATENTS, *Respondent*

PETITIONERS' REPLY TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

The Respondent's memorandum in opposition is extremely puzzling. With the possible exception of point (5) beginning on page 16 of the petition, it does not really come to grips with any of the six questions presented on pages 2-3 of the petition, or with any of at least the first four points numbered 1 (p. 9), 2 (p. 10), 3 (p. 11) and 4 (p. 15) in the petition.

As to the Respondent's brief treatment of the lower court's power to remand, this seems to be a mere quibble since the power of a court of appeals to order remand—a true* remand—has never been questioned by Petitioners. The "e.g." cases cited by the Respondent (*Curtis Publishing Co., Ford Motor Co.* and *Braniff Airways, Inc.*) are of no help. To the extent that these authorities are relevant at all to the six questions and five points enumerated in the petition, they would appear to support Petitioners' position rather than otherwise. Thus, from *Curtis Publishing Co.*:

> "If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, *the matter may be and ordinarily, we think, should be, remanded to the commission,*—the primary fact-finding body, with direction to make additional findings; but if, from all the circumstances, it clearly appears that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute so to do." (260 U.S. at 581) [Emphasis added here and elsewhere]

From *Ford Motor Co.*:

> ". . . while the court [of appeals] must act within the bounds of the statute *and without intruding upon the administrative province,* . . ." (305 U.S. at 373)

From *Braniff Airways, Inc.*:

> ". . . *we must be chary of substituting our own evaluation for that of the Board,* . . ." (379 F.2d at 463)

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* I.e., a remand where the lower tribunal(s) is (are) authorized by the appellate court to consider the matter anew, rather than as here where the lower tribunal(s) had no discretion but to carry into effect (as a purely *ministerial* function) the direction of the appellate court.

None of these three cases was a mandamus action; all three arose under statutes specifically vesting *direct* appellate review authority in a circuit court of appeals. No similar statute was involved in the present case.

Respectfully submitted,

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